ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

In re The Honorable Thomas L. Steffen, Chief Justice, Nevada Supreme Court, and The Honorable Charles E. Springer, Associate Justice, Nevada Supreme Court,

Petitioners.

On Petition for a Writ of Mandamus or Prohibition, or in the Alternative, for a Writ of Certiorari to the Supreme Court of the State of Nevada

~~No. 96-541~~

Supreme Court, U.S.
FILED
DEC 4 1996
CLERK

Jerry Carr Whitehead,

Intervenor-Petitioner.

No. 96-829

REPLY TO OPPOSITION TO MOTION FOR LEAVE TO INTERVENE AS PETITIONER AND PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION OR, IN THE ALTERNATIVE, A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

Petitioner-Intervenor, Jerry Carr Whitehead respectfully submits this response to the opposition of respondent Frankie Sue Del Papa to his motion for leave to intervene as a petitioner. This response is submitted in accordance with SCR 21.4 and SCR 34, due to insufficient time to print this document.

A. The Procedural Objections to the Motion for Leave to Intervene Are Unfounded.

1. SCR 12.2 does not prohibit the intervention of Judge Whitehead in this proceeding. That rule concerns the filing of in forma pauperis petitions. While SCR 12.4 precludes a party who is not shown on the petition as joined at the time the petition is filed, that rule does not defeat Judge Whitehead's motion. As is noted in Stern & Gressman:

> Ordinarily, there is no need for one who has not participated in any way in the proceeding below to attempt to become a party, by intervention or otherwise, in the Supreme Court proceeding. And yet there have been rare occasions where the Court has recognized that the interest of justice demand or justify admitting such a person as a party or as an intervenor for the first time at the Supreme Court level. But every such instance is of the unusual variety, and neither intervention nor the addition of new parties can be considered a procedure available in cases containing no extraordinary factors. R. Stern, E. Gressman, S. Shapiro and K. Geller, *Supreme Court Practice* at 315 (7th ed., 1993).

This proceeding presents extraordinary factors which justify admitting Judge Whitehead

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as a party. He was not a party to the proceedings below which culminated in the entry of the challenged Mandamus Order, because Ms. Del Papa determined to exclude him from those proceedings. The Mandamus Order nullifies relief he sought and obtained in the *Whitehead* case, in which he was a party. It is respectfully requested that this Court, as it has in the past, permit intervention to permit Judge Whitehead to obtain relief from the Mandamus Order which prejudicially affected his rights, *see United States v. Terminal Railroad Association,* 236 U.S. 194, 199 (1915), and to remove from controversy the respondents' assertion that the original petitioners lack standing to challenge the Mandamus Order. *See Rogers v. Paul,* 382 US. 198, 199 (1965); *Mullaney v. Anderson,* 342 U.S. 415, 416-417 (1952).

2. Respondent Del Papa again relies upon SCR 12.2 to support her procedural objection concerning the joinder of the petition for writ of certiorari with the motion for leave to intervene. Clearly, she intended to rely upon SCR 12.4, but that provision does not support her argument. SCR 12.4 is limited to petitions for writs of certiorari. The petition here is one for mandamus or prohibition, and is therefore governed by SCR 20, which does not prohibit the joinder of a petition for an extraordinary writ with a motion for leave to intervene.

3. In her argument that the petition for mandamus or prohibition is untimely, Ms. Del Papa again ignores the fact that the petition is not primarily one for certiorari, but one for an extraordinary writ. SCR 13 is inapplicable and SCR 13.4 does not apply. R. Stern, E. Gressman, S. Shapiro and K. Geller, *Supreme Court Practice* at 275 (7th ed., 1993), citing *Hicks v. District of Columbia,* 383 U.S. 252, 253 n. 1 (1966), Douglas, J. dissenting.

B. To the Extent That the Opposition Advances Substantive Grounds for the Denial of Intervention, its Arguments Lack Merit.

Ms. Del Papa asserts that "Whitehead, by his own admission, has no standing to appear in this matter." *Opposition, page 2.* This incredible assertion is based upon Judge Whitehead's statements, in his petition to intervene, that he was not a party to the proceedings below. Ms. Del Papa sought the nullification of the orders entered in the *Whitehead* proceedings by initiating proceedings before a defective tribunal without affording Judge Whitehead an

opportunity to be heard. This maneuver manifested a blatant disregard of due process. The exclusion of Judge Whitehead from those proceedings is one of the reasons this Court should permit intervention as well as one of the reasons this Court should ultimately grant relief.

As is set forth in the motion for leave to intervene, Judge Whitehead is seeking to intervene and to petition for extraordinary relief on his own behalf:

> 3. Following the appointment of the special master, Ms. Del Papa filed a petition for a writ of prohibition in the supreme court. She named as respondents the three justices of the court who had signed the opinion and order granting relief requested by Judge Whitehead. Judge Whitehead was excluded from the *Del Papa* proceedings which culminated in the state Mandamus Order challenged here. That Mandamus Order nullifies relief obtained by Judge Whitehead in the *Whitehead* case. The exclusion of Judge Whitehead from the *Del Papa* proceedings resulted in his inability to seek review of the Mandamus Order as a party. Accordingly, in order to protect his individual, constitutionally protected interest in the relief he obtained in the *Whitehead* case, Judge Whitehead seeks to intervene here and seeks leave to file a petition for writ of mandamus or prohibition, or alternatively, a petition for writ of certiorari.
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> 4.....
>
> ....The retirement of Judge Whitehead is a direct result of the leaks from the commission, and the resultant devastation of his professional reputation and family's peace of mind. Judge Whitehead's entitlement to retain and enforce the remedies he obtained in the *Whitehead* case has been and will continue to be impacted substantially by the Mandamus Order. The commission has not dismissed the complaints against Judge Whitehead, and under Nevada law, the retirement of a judge does not divest the commission of jurisdiction. *See Goldman v. Nevada Comm'n on Judicial Discipline,* 787 P.2d 30, 40-45 (1990). *Motion for Leave to Intervene, pages 2- 3.*

Ms. Del Papa's suggestion that "Whitehead was not concerned about nor affected by the decision below, since he elected not to attempt to intervene in those proceedings (sic)" is equally outrageous. *Opposition, page 3.* The Mandamus Order below specifically prohibits the filing of any document in either the *Whitehead* case or the Del Papa proceedings absent permission from " a majority of the elected members of the court" - which, in reality, means the two disqualified justices who are the respondents here, and dissenting Justice Shearing. In any event, in order to intervene in the Del Papa proceeding at any stage Judge Whitehead would have been required to seek permission to appear before a tribunal of three - two of whose members were recused and thus had no authority to effect, in any manner, the relief he had obtained previously from a valid tribunal. The argument advanced in this regard by Ms.

Del Papa is too cynical and illogical to follow.

Ms. Del Papa includes in her opposition to the motion for leave to intervene a paragraph in which she argues against the merits of the petition Judge Whitehead seeks leave to file. *Opposition, page 3.* The inclusion of that paragraph is inappropriate to the context of the opposition to the motion to intervene, and accordingly, no response to the merits argument will be included in this reply.

Finally, Ms. Del Papa attempts to prejudice this Court's consideration of Judge Whitehead's motion by accusing Judge Whitehead of "remarkable arrogance for one who has agreed with the United States to retire from office and never again to serve in any judicial capacity in consideration of the government's agreement not to prosecute him." *Opposition, page 3.* Ms. Del Papa somehow employs that accusation as a premise to support her conclusion that " [i]t is disingenuous for him now to be expressing "a genuine concern for the independence of the judiciary and the integrity of the state processes under which judges are subject to discipline." *Opposition, page 3.*

As he did in his petition, Judge Whitehead acknowledges the potential detriment the assertion that he retired in order to avoid federal prosecution could have on a subjective consideration of his arguments. As he did in his petition, Judge Whitehead acknowledges that in the context of this proceeding, the deeply considered reasons for his retirement cannot be explained. All Judge Whitehead can do is hope that documents before this Court at this stage support adequately the reasonable conclusion that, had it not been for the illegal leaks which were the subject of the special master's aborted inquiry and the resultant decimation of

Judge Whitehead's good name and resources, he would not have retired from the bench under any circumstances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Laura Wightman FitzSimmons, counsel of record for intervenor-petitioner Jerry Carr Whitehead in the above-entitled proceeding, being a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 3rd day of December, 1996, I served copies of the Reply to the Opposition to Motion for Leave to Intervene as Petitioner and Petition for a Writ of Mandamus or Prohibition, or in the Alternative, a Writ of Certiorari to the Supreme Court of the State of Nevada by mailing copies thereof as noted below in duly addressed envelopes, with first-class postage prepaid, to each person below. On November 26, 1996, I deposited the envelopes with first class postage prepaid, containing necessary copies of the said opposition at the United States Post Office located at 3100 S. Industrial Road, Las Vegas,

Nevada. All of the following parties have been served and this mailing occurred within the time permitted under the Rules of the Supreme Court of the United States.

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